

Australia and New Zealand Bank Limited - - - - *Appellants*

v.

Ateliers de Constructions Electriques de Charleroi - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL. DELIVERED THE 22ND FEBRUARY 1966

Present at the Hearing:

LORD REID

LORD MORRIS OF BORTH-Y-GEST

LORD PEARCE

LORD UPJOHN

LORD PEARSON

(Delivered by LORD PEARSON)

This is an appeal from a judgment in a commercial cause by Manning J. in the Supreme Court of New South Wales. He gave judgment for the plaintiff company, now the respondents in this appeal, against the defendant bank, now the appellants in this appeal, for £55,540 18s. 7d. as damages for the conversion of fifteen cheques. The basis of the judgment was that the cheques, drawn in favour of the plaintiff company and duly delivered or sent to their agent, were without authority and wrongfully indorsed by the agent and paid into his account with the defendant bank, and that the defendant bank wrongfully converted the cheques by receiving them and collecting the proceeds for the agent's account. The total amount of the cheques was £280,309 16s. 11d., and in respect of them sums amounting to £224,768 18s. 4d. were remitted by the agent to the plaintiff company, so that there was a shortage of £55,540 18s. 7d. The judgment was for damages equal to the amount of the shortage.

At the trial the defendant bank had put forward five points as defences to the plaintiff company's claim, namely:—

- (1) that the agent had actual authority, express or implied, from the plaintiff company, to indorse the cheques and pay them into his account;
- (2) that the plaintiff company represented to the defendant bank that the agent had such authority, and the defendant bank in reliance on the representation acted to their detriment in receiving the cheques and collecting the proceeds for the agent's account, and therefore the plaintiff company are, as against the defendant bank, estopped from denying that the agent had such authority;
- (3) that the plaintiff company ratified the agent's acts in respect of the cheques as done on their behalf;
- (4) that the defendant bank had a statutory defence under section 88 of the Australian Bills of Exchange Acts 1909-58 (corresponding to section 82 of the English Bills of Exchange Act 1882), because they had in good faith and without negligence received payment of these cheques for the agent as their customer;
- (5) that the agent was part owner of the cheques or some of them and by virtue of his part ownership was entitled to indorse them and have the proceeds collected and paid into his account.

But at the hearing of this appeal counsel for the defendant bank abandoned points (4) and (5), explaining that the abandonment of point (4) did not involve any admission that the defendant bank had been negligent. He elected to rely only on points (1), (2) and (3)—actual authority, ostensible authority and ratification. As the arguments in the appeal were developed, it became evident that the principal question was whether the agent had actual authority, express or implied, from the plaintiff company to deal with the cheques as he did. If he had such actual authority no question of ostensible authority or ratification would arise. Examination of the facts is required.

The plaintiff company at all material times carried on business at Charleroi in Belgium as (*inter alia*) manufacturers of heavy electrical equipment. Mr. Haesaerts, who was in the employment of the plaintiff company and soon afterwards became head of their Export Division, came out to Australia in December 1952, in order to investigate and prospect the potential market in Australia for goods of their manufacture, and, according to his findings, to propose to the plaintiff company that they should appoint a representative or form a company. Mr. Haesaerts did not state in his evidence what proposal he made, but in fact the plaintiff company appointed a representative and did not form a company in Australia.

On the 24th February 1953 an agreement was made between the plaintiff company, represented by its Director-General, and "the firm Helios (Heavy Electrical and Engineering Company) at Sydney, represented by Mr. T. Ismet Guler, its owner-manager." Mr. Guler afterwards formed a company called "Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd." which took over the business of the firm. As the learned judge said in his judgment "It seems to have been regarded by all parties as unnecessary to distinguish between Mr. Guler personally, the firm and the company, and all three have been treated as one and the same." "Helios" is a useful word for covering all three—Mr. Guler, the firm and the company—and may be treated as a masculine singular noun. The agreement was in French and, as two different translations are available, there is some choice of phrasing, but there is no problem of interpretation.

Article 1 of the agreement gave to Helios exclusive representation for the Australian territory for the sale of all material manufactured by the plaintiff company. Article 3 provided that, unless otherwise indicated by one or the other of the parties, the plaintiff company would forward to Helios their lowest prices, quoted generally in the currency of their choice, for goods delivered F.O.B. Antwerp or C.I.F. Australian port, including suitable packing, but with customs duties and taxes excluded. Article 3 also provided commissions for Helios at specified rates. Article 4 provided that in respect of all business transacted through Helios, and whatever might be the conditions of payment decided by mutual agreement,

- (a) without permission from the plaintiff company Helios could not deal except in the currency stipulated in the plaintiff company's offers;
- (b) Helios would be guarantor to the plaintiff company of the solvency of his customers;
- (c) the commissions provided for in Article 3 would be payable only on final completion of the transactions.

Article 4 also provided that for important transactions with certain authorities the contracts would be drawn up directly between the customers and the plaintiff company. By Article 5 Helios undertook to do any necessary advertising for developing sales in his territory, to visit his clients regularly, to keep himself informed of new possibilities of business, and, in a word, to fulfil in relation to the plaintiff company all the obligations of a good representative. In particular Helios undertook to open in the centre of Sydney an agency office (French "bureau de représentation") for the plaintiff company. Article 5 also provided that the expenses of advertising, correspondence, cables, purchase of specifications, travelling and otherwise, should be the responsibility of Helios. By Article 6 the plaintiff company promised to give technical assistance to Helios, and to facilitate the work of Helios by furnishing without charge their publications of all types, agendas and other advertising

material which they normally furnish to their offices abroad (French "bureaux étrangers"). By Article 8 as afterwards amended the agreement would remain in force until the 28th February 1957 and thereafter from year to year until terminated by notice.

Helios arranged a number of contracts under which the plaintiff company would supply heavy electrical equipment to Australian customers. This case is directly concerned only with a contract made with the Snowy Mountains Hydro-Electric Authority (which for want of a better abbreviation has been and will be referred to as "Snowy") for the supply, delivery and supervision of erection of seven transformers of 56 M.V.A. and auxiliary equipment. This contract was in substance concluded by an acceptance letter dated the 27th July 1955, although the formal contract was not signed until later. It was under this contract that the fifteen cheques were drawn and issued. However, on the question as to the extent of the authority of Helios in respect of such cheques the relevant arrangements in the other contracts have some bearing. The relevant arrangements are those as to parties and as to modes of payment. Full details of the other contracts are not available; it was reasonable not to increase the already great bulk of the documents by including them. But there is enough information to show that some at least of these other contracts were earlier in date than the contract with Snowy and had been partly performed before performance of the contract with Snowy began. The outlines of the relevant arrangements are sufficiently clear, and two types of contract can be distinguished.

Type A—There were about seven contracts with the Electricity Commission of New South Wales, including a contract known as E.60 dated the 8th October 1953 and involving the supply of eight transformers of 30 M.V.A. The parties to that contract were the plaintiff company and the Commission. The price of the equipment C.I.F. Australian port was payable by the Commission to the plaintiff company, but the local expenses (e.g. for customs duty and transport and insurance in Australia) were to be invoiced by Helios to the Commission and paid by the Commission to Helios. The original arrangements and the amended arrangements for payment of the C.I.F. price (less 5% retention) appear from a letter dated 28th January 1954, in which the plaintiff company said to the Commission "we beg to recall that it was initially being agreed that payment would be made in London, up to 95% of the C.I.F. price of plant from time to time shipped, in pounds sterling upon presentation of on board bills of lading, insurance certificates and a certificate by the Commission's authorised Inspecting Engineer that the plant in question has passed the necessary and appropriate tests at the manufacturer's works. We have been informed by our representatives in Sydney, Messrs. Helios, that you are prepared to transfer the invoiced amounts in Belgian francs or transferable pounds sterling to be converted into Belgian francs, after having checked the above-mentioned shipping documents. We agree to receive direct payment by bank transfer from your company to ours after Messrs. Helios will have been possessed of said documents sent from our end." Under a contract of this type there would be many things to be done or arranged by Helios as the agent for the plaintiff company, e.g. obtaining the necessary import licences, receiving the transformers, payment of customs duty, transport and insurance of the transformers to the site, supervision of erection, and financial arrangements for the payment of the C.I.F. price by the Commission in Australia through the banks to the plaintiff company in Belgium. But the financial arrangements would be simple in principle: the amount of the C.I.F. price in Australian currency (less the 5% retention) would be paid directly by the Commission to the defendant bank and would be used by the bank in purchasing a sum of Belgian francs in Belgium for the credit of the plaintiff company; the local expenses incurred by Helios would be paid by the Commission to Helios.

Type B.—There were made with the State Electricity Commission of Western Australia five contracts for the supply of transformers, with the Northern Rivers County Council one contract for the supply of transformers, and with the State Electricity Commission of Victoria one contract for the supply of transformers and one for the supply of lightning arrestors. In these

contracts Helios appeared as the party contracting to supply the transformers or other equipment, though Helios was in fact contracting as agent for the plaintiff company. Under these contracts the price was payable to Helios, and consequently the cheques were drawn in his favour, received and indorsed by him and paid into his account with the defendant bank. It was his duty to remit to the plaintiff company the C.I.F. content of the price or cost of the equipment (making all the necessary arrangements in respect of import licences, exchange control and otherwise) but the residue of the price would be in the bank account of Helios covering the local expenses incurred by him.

In February 1955 an arrangement was made by the plaintiff company at the request of Helios to assist Helios to make payments of customs duties and other local expenses before receiving payments from the customers. The plaintiff company guaranteed an overdraft on the Helios account with the defendant bank up to a limit of £5000 0s. 0d., which was afterwards raised to £10,000 0s. 0d. This arrangement was no doubt helpful to Helios, but did not affect the reimbursement of the local expenses. That reimbursement would be made to Helios under the Type A contracts by direct payment of the local expenses as such by the customers to Helios, and under the Type B contracts by payment of the whole price, including the element of local expenses, by the customers to Helios.

The contract with Snowy was negotiated by Helios. After consultation with the plaintiff company Helios submitted a tender dated 13th December 1954 and discussions and correspondence ensued. On the 21st March 1955 for the purpose of these negotiations the plaintiff company cabled to Snowy a "full credential" in terms requested by Helios, and followed it with a confirming letter of the 23rd March 1955, which was almost in the same terms. The letter referred to the cable and said "We wish to confirm that Messrs. Helios Heavy Electrical Engineering Contracting Co., City House, 164 Pitt Street, Sydney, owned by Mr. T.I. Guler, are our general agents for Australia and that they have the power of attorney to act on our behalf for the submission, the execution and the realisation of contracts made or subcontracted by ourselves with our full technical and financial backing." The word "realisation" does not have an exact meaning in relation to a contract, but would naturally include both the performance of the plaintiff company's contractual obligations in Australia and also taking steps to obtain for the plaintiff company the benefit of Snowy's performance of the contract.

In letterheads used by Helios there was a description of Helios as "Sole Australian agent for A.C.E.C. Charleroi, Belgium" or a description of the Helios office as "Australian office for A.C.E.C." No objection was made by the plaintiff company.

The contract with Snowy was in effect concluded by Snowy's letter of acceptance dated the 27th July 1955 and addressed to Helios. The formal contract came much later on the 13th June 1957, and was signed on behalf of the plaintiff by Mr. Guler under a special power of attorney. But performance proceeded before the execution of the formal contract.

The contract with Snowy differed in respect of the relevant arrangements both from the Type A contracts and from the Type B contracts mentioned above. The party contracting to supply the transformers was the plaintiff company. The whole price, including not only the C.I.F. content or cost of the equipment but also the amount of the local expenses, was payable to the plaintiff company, and was payable in Australian currency in Australia. In the course of the negotiations Helios had tried to obtain a provision for payment of the amount of the local expenses to Helios, but Snowy would not agree to such a provision and Helios had to agree that the whole price should be paid to the plaintiff company. The contract also provided that for the purpose of conversion into Belgian currency for transmission to the plaintiff company a fixed rate of 112 Belgian francs to the Australian pound should be assumed.

Other provisions of the contract which need to be mentioned were as follows:—

- (i) Under clause 14 of the General Conditions and clause 6(2) of the Specification progress payments, if required by the plaintiff company,

were to be made by Snowy on an engineer's certificate of the progress of the manufacture at the plaintiff company's works and a bank guarantee of repayment in the event of non-delivery of the equipment concerned;

- (ii) Under clause 18 of the General Conditions every application by the plaintiff company for payment by Snowy was to be accompanied by a detailed claim in duplicate setting forth particulars of the claim;
- (iii) Under clause 29 of the General Conditions the plaintiff company was to maintain a competent representative in Australia having authority to act for them and satisfactory to Snowy;
- (iv) Oil for filling the transformers was to be supplied by the plaintiff company, and the figure for the oil shown in Schedule VIII was £20,692.

Afterwards the plaintiff company instructed Helios to order and pay for the oil and to invoice it to Snowy.

By June 1956 enough progress had been made with the manufacture of the transformers to justify a progress payment of £62,180 11s. 2d., representing 40% of the F.O.B. value of one transformer and 20% of the F.O.B. value of the other six transformers. The necessary bank guarantee was arranged through the plaintiff company's Belgian bank and the defendant bank. Then the first of the fifteen cheques was drawn by Snowy and delivered or sent to Helios as agent for the plaintiff company. It was dated the 27th June, and was for £62,180 11s. 2d. It was drawn in favour of "Ateliers de Constructions Electriques de Charleroi C/- Helios Heavy Elect. Engr. and Contracting Co. 164 Pitt Street, Sydney." It was then indorsed by Helios and paid into the account of Helios with the defendant bank at their Chatswood Branch. The indorsement was by means of a rubber stamp with the words "Helios Heavy Electrical Engineering and Contracting Co., 197 Victoria Avenue, Chatswood J.A. 2592" and then a signature "T. Holt". On the 29th June 1956 Helios wrote to the defendant bank, asking them to transmit by telegraphic transfer to the plaintiff company the sum of 6,964,222 Belgian francs, and attaching a cheque for £62,967 12s. 0d. made out at an exchange rate of 110.6 Belgian francs to the Australian pound. The telegraphic transfer was duly carried out through the defendant bank and the plaintiff company's Belgian bank, and notified to the plaintiff company. In a letter of the 3rd July 1956 the Belgian bank referred to the transfer as "On instructions Helios Co.", but in a credit advice of 11th July 1956 they said that the remitter was Snowy.

As appears from the evidence of Mr. Guillery, who was from late in 1954 to May 1960 manager for the plaintiff company for the export zone which included Australia, no instruction was given by the plaintiff company at this time, or at any time before about May 1958, as to the mechanism of the financial operation involved. They received the correct sum of Belgian francs in Belgium, and they were evidently content with that. They left to Helios, as their general agent in Australia already charged with many tasks on their behalf, the further task of devising or using appropriate mechanism for receiving payment of the sum of Australian currency in Australia and converting it into a sum of Belgian francs credited to the plaintiff company in Belgium. Payment by Snowy of the sum of Australian currency was naturally made by means of a cheque made out in favour of the plaintiff company and delivered to Helios. The plaintiff company had no bank account in Australia. Helios had a bank account which had been used for the reception of very large sums paid to Helios as agent for the plaintiff company under the Type B contracts. In the circumstances it is not surprising that Helios indorsed the cheque for the plaintiff company and paid it into the Helios bank account, and then drew a cheque on the account to enable the defendant bank to purchase the necessary sum of Belgian francs to be credited to the plaintiff company in Belgium. That was a convenient mechanism by which the intended result was achieved.

On this point questions were put to Mr. Guillery in cross-examination. He said he knew that under the Snowy contract payments were to be made in Australian currency, but did not know until later that they were made by cheque. Then followed these questions and answers:—

“Q. At all events you would expect that someone would have to convert it into Belgian currency or purchase the requisite Belgian currency. You anticipated that? A. Yes.

Q. And won't you agree that Helios was your agent for that purpose?
A. Yes.

Q. And he had the authority of the company—did he not—to do whatever was necessary to enable it to be sent to you in Belgian francs?

A. Yes. Just like with other customers; the Electricity Commission of N.S.W. for instance.”

It is however surprising that the defendant bank should have taken the risk of accepting the cheque for collection in spite of the irregular indorsement, and collecting the proceeds of the cheque for the account of their customer Helios, and not asking for any confirmation of the indorsement or of the authority of Helios to indorse such cheques on behalf of the plaintiff company. There was some evidence on this point and it was considered in the judgment of the learned judge, as it was relevant to the question of ostensible authority and to the statutory defence, but it is separate from the question of the actual authority of Helios, which is now being considered.

In respect of the first cheque there was an exchange difference. The plaintiff company was entitled under the contract to receive 6,964,222 Belgian francs as the equivalent of £62,180 11s. 2d. at the rate of 112 Belgian francs to the Australian pound. But the rate of exchange had moved in favour of Belgium. Helios sent to the defendant bank a cheque for £62,967 12s. 0d., assuming an exchange rate of 110·6, but this was not enough because the actual rate on the material date was 110·12, and Helios had to pay to the defendant bank a further sum of £274 10s. 4d. Thus Helios had paid out £62,967 12s. 0d. plus £274 10s. 4d. and had only received £62,180 11s. 2d. and so were out of pocket to the extent of £1,061 11s. 2d. Snowy then gave the second cheque, which was dated the 27th August 1956, for that sum payable to the plaintiff company. That was indorsed by Mr. Guler and paid into the account of Helios, and as that sum was making good the loss sustained by Helios there was no remittance to the plaintiff company. Any objection to Helios's dealing with this cheque would have been technical rather than practical. Mr. Guillery, was asked in cross-examination “And you do not complain about him paying that into his account, do you”, and he said “I do not understand. I have no complaint. We did not complain about that, no.”

On the 10th January 1957 Snowy wrote a letter to Helios containing instructions with regard to (*inter alia*) the manner in which claims for payment were to be made, and enclosing a specimen of the form to be used. The form required entries to be made under headings relating to F.O.B. value, marine freight, insurance to site and transport in Australia, and there was a heading “(g) portion of total claim to be remitted to Belgium”. Helios sent a copy of that letter to the plaintiff company on the 1st February 1957. The plaintiff company replied on the 15th June 1957, dealing with details of the claim to be made, and they said: “We understand that the claim forms will be drawn up by you as for progress payments. We leave you the care to complete the paragraphs (f) and (g) of the customer's sample.” At this stage it must have been apparent to both parties that only a portion of the sums paid under the contract could be remitted to Belgium. Exchange control was associated with import licensing, and there would be no reason for allowing foreign exchange to be used in payment of local expenses incurred in Australia, for instance those referred to in headings (e) and (f) of the claim form—insurance to site and transport in Australia. The amount of the local expenses included in any payment by the customer would have to be retained in Australia. Where, how and by whom would it be held? The plaintiff company gave no instructions and made no enquiry on these points, leaving them to be settled by Helios as their general agent in Australia.

The third cheque given by Snowy was dated the 27th May 1957 and was drawn in favour of the plaintiff company care of Helios, as before, and was indorsed in the name of the plaintiff company with a signature by Mr. Guler,

and was paid into the account of Helios. The amount was £38,862 17s. 1d., and there was a remittance to Belgium through the banks as before, and the plaintiff company received the proper sum of Belgian francs corresponding to the sum of £38,862 17s. 1d.

Similarly there was a fourth cheque given on the 30th August 1957 for £9,822 8s. 7d. and there was a corresponding remittance to Belgium on the 16th September 1957.

The fifth cheque was dated 9th September 1957 and was for £3,513 1s. 6d. covering local expenses, and no remittance was made.

The sixth cheque was dated 23rd September 1957, and was for £15,545 2s. 10d., and there was a corresponding remittance to Belgium on the 4th November 1957. That was a substantial delay. Things were beginning to go wrong.

The seventh cheque, dated the 21st October 1957, was for £6,189 14s. 10d., of which only £529 8s. 5d. was for local expenses, so that £5,660 6s. 5d. should have been remitted, but the remittance was delayed until January 1958.

The eighth cheque, dated the 28th October 1957 was for £5,919 15s. 2d. of which £4,992 7s. 0d. was for local expenses, so that £927 8s. 2d. should have been remitted, but the remittance was not made.

Further cheques were given up to the 14th April 1958, which was the date of the fifteenth and last cheque. The remittances were irregular and seriously deficient.

Over a long period the plaintiff company in their correspondence with Helios had been complaining that they were not receiving sufficient information from Helios as to the state of the accounts under the several contracts. They wished to know under each contract what sums had been claimed, what sums had been paid by the customer, and which of the sums remitted were attributable to that contract. Helios persistently failed to give that information, and the learned judge has found that Helios was acting in bad faith, withholding monies that should have been paid to the plaintiff company and keeping them in the dark as to the true state of the accounts. There is evidence to support these findings, and they cannot be impugned. Helios had other business besides the agency for the plaintiff company, and the other business may have absorbed money which should have been remitted to the plaintiff company.

Mr. Guillery had visited Australia and had many meetings with Mr. Guler in 1955 and 1957, and he came again to Australia in February 1958 to investigate the position. On the 26th April 1958 he wrote what may be called a "whitewashing" letter to Snowy, saying, though he knew this was not entirely true, that he had found everything perfectly in order and all remittances from Snowy for the plaintiff company had been transferred by Helios. Mr. Guillery had reasons of policy for writing that letter, and it is not in itself significant, but his answers in cross-examination on it are interesting:— "Q. But you knew the moneys had gone to Helios? You knew they had gone into his account? A. I knew that the money was paid to Helios, but how, I did not know. Q. Provided he accounted for it to your company you would not at that time have taken any objection, would you? A. No."

On the 23rd May 1958 Mr. Guillery went to the offices of Snowy and was shown the cheques and so became aware that they had been indorsed by Helios and paid into the Helios account. He desired that future payments should be kept away from Helios. Snowy desired to be assured that their past payments were valid and effective. Mr. Guler was willing to co-operate. Accordingly a document was drawn up by Snowy and signed by Mr. Guillery and Mr. Guler. It was dated the 28th May 1958. It referred to Contract No. 40,006 (the relevant Snowy contract for seven transformers of 56 M.V.A) and to Contract No. 40,019 for twenty-two lightning arrestors (in which evidently Helios appeared as the contracting party), and it said "We the undersigned, representatives of Ateliers de Constructions Electriques de Charleroi and Helios Heavy Electrical Engineering Contracting Company Pty. Ltd., the Contractors for the above-mentioned Contracts, respectively

hereby request that all future payments due by the Authority to the Contractors under those Contracts be made by the Authority's cheques payable and paid to the Sydney Branch of Comptoir National d'Escompte de Paris to be credited to the account of Ateliers de Constructions Electriques de Charleroi with the said Bank and *We state* that the receipt of the said Bank for the said payments shall be a sufficient discharge to the Authority of its liability to the said Contractors for the said payments under the said Contracts and *We acknowledge* that all payments made by the Authority on account of the said Contracts up to the date hereof have been properly made and have been received by the said Contractors on the said account and *We undertake* to furnish to the Authority within one month of the date hereof written confirmation by the said Contractors respectively of the above request, statement and acknowledgment." Written confirmation was given on behalf of the plaintiff company on the 19th June 1958. The acknowledgment contained in this document is relied upon by the defendant bank as constituting a ratification of the reception of the money by Helios into the Helios bank account as a due reception of it on behalf of the plaintiff company. It can be contended on the other side that this acknowledgment was given only to reassure Snowy that as between Snowy and the Contractors the past payments had been duly made and received, and that the acknowledgment does not necessarily mean any more than that the cheques had been duly given and received as conditional payment and there was no failure to honour the cheques on presentation. It is not necessary to express any opinion on the question of ratification. In relation to the question of actual authority, it is of some significance that there was no concurrent reservation of rights against Mr. Guler and at any rate no written complaint at this time about the indorsement of the cheques by Helios and payment of them into the Helios account. Equally there was not at this time any written complaint against the defendant bank in respect of their having collected the proceeds of the cheques for Helios. It is doubtful whether there was any oral complaint against the defendant bank. Mr. Guillery in evidence said he "probably" made one. On the other hand there is a contemporaneous note made in the defendant bank's diary of an interview with Mr. Guillery on the 23rd June, 1958, and it records that "he made no reflection on our bank".

Mr. Guillery consulted a firm of solicitors in Sydney, and they, presumably on the basis of his instructions as well as their own consideration of the position, wrote a letter to Mr. Guler dated the 10th June 1958, in which they said:—

"Referring in particular to contract with the Snowy Mountains Authority, it appears that, in addition to the goods sold per medium of you, your Company "Helios" contracted to carry out certain work in connection with the transport of the materials to the sites for erection and in connection with the erection of the material on the sites chosen by the Snowy Mountains Authority. For this latter work you were entitled to receive your special remuneration or rather your company "Helios" was entitled to receive its own special remuneration. We understand that included in the cheques received from the Snowy Mountains Authority and made payable to A.C.E.C. were some moneys which belonged to Helios. Having received the cheques and paid them into the account of Helios your plain duty was to account immediately to our clients for that portion of the proceeds which really belonged to them. This was not done."

That letter reflects the attitude of the plaintiff company which is shown by the history of the case. They were strenuously complaining of the failure to account and the failure to remit. They were not interested in the mechanism of the reception of the money and the making of the remittances. They made no protest against the procedure adopted by Helios in indorsing the cheques and paying them into the Helios account.

The business of Helios did not prosper, and in July 1958 the defendant bank, acting under an equitable mortgage, appointed a receiver of the Helios company's undertaking. Afterwards there was a liquidation and the Helios company was found to be insolvent.

The plaintiff company's claim against the defendant bank was made for the first time in a letter of 12th January 1960, and the writ was issued on the 20th February 1961.

The learned judge decided in favour of the plaintiff company in a careful judgment dealing with the numerous points raised on behalf of the defendant bank. His decision on the question of actual authority seems to have been partly based upon or influenced by an erroneous impression of similarity between the Type A contracts (those made with the Electricity Commission of New South Wales) and the Snowy contract. In fact these contracts differed in material respects, as has been pointed out above. Under the Type A contracts the customer contracted to pay the cost of the equipment to the plaintiff company in Belgian currency in Belgium, so that no bank account in Australia was required for this purpose, and the amount of the local expenses was paid directly by the customer to Helios and so was from the beginning a separate amount. Under the Snowy contract Helios received cheques drawn in favour of the plaintiff company for sums of Australian currency in Australia, and it was necessary for Helios by some means (a) in many cases to divide the amount of a single cheque into the part allowed to be remitted to Belgium and the part to be retained in Australia, (b) in so far as remission was permitted, to transmute sums of Australian currency in Australia into sums of Belgian currency credited to the Belgian company in Belgium, and (c) out of the amount retained in Australia to reimburse Helios for his outlay on the local expenses.

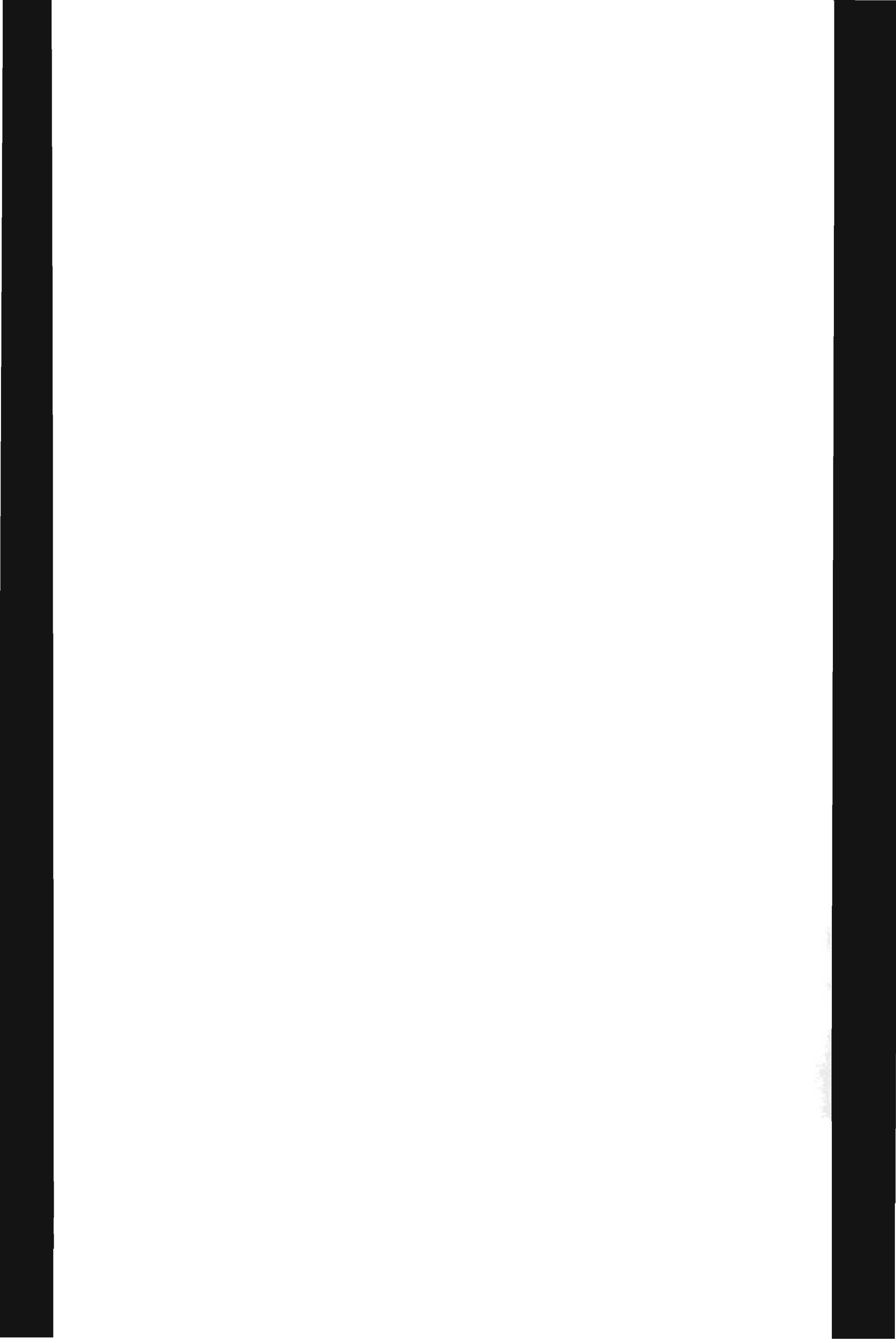
Did Helios have actual authority to indorse the cheques and pay them into the Helios account? Normally of course it would be quite wrong for an agent without specific authority to indorse his principal's cheques and pay them into his own account. That is the strength of the plaintiff company's case and of the learned judge's decision in their favour. On the other hand the special facts and history of this case have to be brought into account, and in a commercial case of this kind it is right to take a practical, commercial view rather than a technical or legalistic view. How would the case appear, and how did it appear, to the business men concerned? It is necessary to consider the position and functions of Helios as the general agent for the plaintiff company in Australia. Helios was operating the "Australian office" for the plaintiff company, and was acting as importer and holder of the import licences for the equipment supplied by the plaintiff company, and was arranging and paying for the performance of the plaintiff company's contractual obligations in Australia in respect of transport, insurance, supervision of erection and provision of oil, and was collecting the very large sums falling due from very important customers. There was the "full credential" of the 22nd March 1955, declaring that Helios was authorised to act on behalf of the plaintiff company for the submission, the execution and the realisation of contracts, made or subcontracted by the plaintiff company, with their full technical and financial backing. There was the course of business established under the Type B contracts for incoming payments to be received into the Helios account and remittances to be made from it. There was the need to have some means of (i) receiving the money (ii) paying for the remittances to Belgium (iii) holding the sums not allowed to be remitted to Belgium (iv) reimbursing to Helios the outlays on local expenses. There was the persistent attitude of the plaintiff company in giving no instructions, and apparently making no enquiry, as to the mechanism or procedure for the reception of the money and the making of the the remittances, and in not complaining of the mechanism or procedure when they ascertained what it was. Helios was an exceptionally general and exceptionally trusted agent.

In the end the compelling point is this. The sums due were payable in Australian currency. If Snowy had chosen to make payment in cash, admittedly Helios had authority to receive it. But payment by order cheques in favour of the plaintiff company must have been expected. It could not have been supposed that they would be sent to Belgium to be indorsed, and the plaintiff company had no bank account of their own in Australia. Apart from exchange control difficulties, the only practical plan from a business

point of view was for Helios to indorse the cheques and pay them in to the Helios account. This became the only possible plan when the total amount of the cheques exceeded the sum which exchange control permitted to be exported, or when it became proper for Helios to retain part of the sum in any cheque to pay local expenses. Implied authority was necessary to give business efficacy to the transactions. In view of the large sums which the plaintiff company knew that Helios had earlier paid into that account under other contracts, it is easy and natural to infer the necessary authority to meet any difficulty caused by the fact that the precise method of payment by Snowy differed from the methods of payment under earlier contracts.

For these reasons their Lordships consider that there was implied actual authority.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed, and that judgment should be entered for the defendant bank. The plaintiff company must pay the bank's costs of the action and of this appeal.



In the Privy Council.

AUSTRALIA AND NEW ZEALAND
BANK LIMITED

v.

ATELIERS DE CONSTRUCTIONS
ELECTRIQUES DE CHARLEROI

DELIVERED BY
LORD PEARSON

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1966